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In The

Supreme Court of the United States

October Term, 1989

PATRICIA M. WOOD, et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the First Circuit held that federal law impliedly preempts a state common-law claim that a 1976 motor vehicle is defective because it was equipped with one restraint system option granted by federal law, seat belts, not a different option, airbags. All federal and state appellate courts to address the question, and a host of trial courts, are in accord with the First Circuit. Should this Court review the First Circuit's decision?

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INTRODUCTION

The First Circuit held that federal law preempts petitioner's common-law claim that a 1976 vehicle is defective because it was equipped with one restraint system option granted by federal law, seat belts, not a different option, airbags. Petitioner seeks review of that decision.

Just last term, a petition was filed seeking review of an identical holding of the Minnesota Court of Appeals, the first appellate court to address the issue, and this Court declined to review it. *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2905 (1988). Since then, five more appellate courts (including two other federal circuit

courts) – that is every federal and state appellate court to address the issue – also have held airbag claims pre-empted. Some forty trial courts, federal and state, are in accord. They are plainly right, under settled principles laid down by this Court.

There is virtual unanimity here, no conflict, and no reason to review this decision. The petition should be denied.

STATEMENT OF THE CASE

I. PETITIONER'S CLAIM.

Petitioner was riding in a 1976 Blazer, a multipurpose passenger vehicle, sharing the passenger seat with a friend, when the driver drove into a tree. Petitioner was not wearing her seat belt and was seriously injured. The belt system fully met the requirements of the applicable federal regulation, Federal Motor Vehicle Safety Standard 208 ("FMVSS 208").

Petitioner brought this action against General Motors Corporation, alleging that the Blazer was defective because it was equipped with seat belts, not airbags.[1]

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[1] Petitioner's complaint refers to airbags. However, petitioner sometimes referred to passive restraints (airbags or automatic belts) in the Court of Appeal, and does so here as well. We refer to petitioner's claim as an airbag claim. The same preemption analysis applies to an automatic belt claim, if made.

II. THE SAFETY ACT.

In 1966 Congress determined that, given the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," the country needed motor vehicle safety standards that were "strong and adequately enforced," and "*uniform* throughout the country." S. Rep. No. 1301, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 2709, 2720; *see* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966) (emphasis added). Therefore it concluded that "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." S. Rep. No. 1301, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 2709, 2712; (App., pp. 5a-6a).

Accordingly, Congress enacted the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.* ("Safety Act"). The Safety Act directs the Department of Transportation and its subdivision, the National Highway Traffic Safety Administration ("NHTSA"), to issue federal motor vehicle safety standards that are "practicable," "meet the need for motor vehicle safety," and apply throughout the country. 15 U.S.C. § 1392(a). The "task called for considerable expertise." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co. ("State Farm")*, 463 U.S. 29, 33 (1983).

"Whenever" the Department establishes a federal standard, the Safety Act expressly preempts state safety standards as to "the same aspect of performance" not "identical to the Federal standard." 15 U.S.C. § 1392(d).

The Safety Act also provides that compliance with a Federal Standard "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c). That general "savings clause" does not purport to save claims based on a nonidentical common law standard that directly conflicts with a federal standard. (*See* pp. 25-27, below.)

III. FMVSS 208.

The Department of Transportation first adopted FMVSS 208, the occupant restraint standard, in 1967. It required installation of manual lap belts in all new cars. 32 Fed. Reg. 2415 (1967).

A. 1972-1975: Congress Prohibits Any Standard Mandating Airbags Unless Submitted To And Not Disapproved By It.

"The safety benefits of wearing seat belts are not in doubt. . . ." *State Farm*, 463 U.S. at 52. However, manual seat belts are "active restraints," because the occupant must act to use them, and after original FMVSS 208 issued, many people did not use them. Therefore, in 1972 the Department amended FMVSS 208 prospectively to require installation of airbags or automatic seat belts in all cars built after August 15, 1975. Airbags or automatic seat belts are "passive restraints," because they work automatically.

At the same time, the Department required "vehicles built between August 1973 and August 1975 . . . to carry either passive restraints or [manual] lap and shoulder

belts coupled with an 'ignition interlock' that would prevent starting the vehicle if the belts were not connected." *State Farm*, 463 U.S. at 35.

There was a public outcry against ignition interlocks, and in 1974 Congress outlawed the "ignition interlock" standard. It also prohibited the Secretary of Transportation from requiring airbags or any other nonbelt restraint system unless, among other things, such a standard had been submitted first to both houses of Congress and not disapproved by them. 15 U.S.C. §§ 1410b(b), 1410b(c). Congress authorized a standard permitting manufacturers to install nonbelt restraint systems, but only if the standard also permitted the manufacturers to install manual belt systems instead. 15 U.S.C. § 1410b(b)(3)(A).[2]

Congress' purpose, and § 1410b's effect, are clear: (1) Neither motorist nor manufacturer is to be required to buy or install "anything more than" manual seat belts and a warning signal, because more was "not justified." 120 Cong. Rec. 27816, 27822 (1974) (remarks of Representative Wyman, the author of the amendment that became § 1410b). (2) The Secretary is therefore to permit the manufacturer the option to install manual seat belts. (3) The Secretary "could permit a manufacturer (at his option) to comply with a standard with a nonbelt system instead of a belt system." H.R. Rep. No. 1452, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6084, 6108. But (4) the Secretary could not take

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[2] A "belt system" under the Act is a manual belt system. *See* H.R. Rep. No. 93-1452, 93rd Cong., 2d Sess. 44-45 (1974); 120 Cong. Rec. 27816, 27882 (1974).

away the manufacturer's option to install manual seat belts without Congress' assent.[3]

B. The Options.

Accordingly, on October 31, 1974 the Secretary amended FMVSS 208 to delete the ignition interlock requirements. 39 Fed. Reg. 38380 (1974). As amended, FMVSS 208 granted manufacturers the option to install one of three restraint systems: (1) passive restraints for front and lateral crashes; (2) passive restraints for front crashes plus lap belts for side crashes and rollovers; or (3) manual seat belts. Those were the same three options FMVSS 208 provided before the ignition interlock episode. Thereafter, FMVSS 208 granted those same "three options," 41 Fed. Reg. 36494 (1976), and rejected a mandatory airbag rule, in every model year from 1976-1981.

C. 1976-1981: Transportation Secretaries Reject Mandatory Airbags.

1. 1976: Secretary Coleman

Secretary Coleman undertook a comprehensive study of passive restraints. He determined not to mandate them, and instead reaffirmed the manufacturer's "option" to install manual belts. 41 Fed. Reg. 24070, 36494 (1976); 42 Fed. Reg. 5071 (1977). The reasons were these:

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[3] Even if the legislative veto aspect of § 1410b fails (*see I.N.S. v. Chadha*, 462 U.S. 919 (1983)), Congress' intent in enacting § 1410b is clear.

a. *Public Acceptance.* A policy "unacceptable" to the public would be contrary to the "goal of safety," and "every sampling of public opinion" showed most Americans did not want mandatory passive restraints. The Secretary's Decision Concerning Vehicle Occupant Crash Protection, D.O.T., Dec. 6, 1976, pp. 6, 11, 32, 52-57 ("Secretary's Decision").

b. *Development of Technology and Data.* It was important to "foster the continued development of passive restraint technology" and obtain more data before mandating them or any one of them. Secretary's Decision, pp. 9, 12, 27, 34, 57.[4]

c. *Increased Manual Belt Use.* It was likewise important to develop better manual seat belts. Secretary's Decision, p. 29. Education might increase manual belt use and so make passive restraints unnecessary; airbags provided no greater protection than seat belts, when used. Secretary's Decision, pp. 7, 13, 29, 33.

d. *Disastrous Economic Consequences.* Mandating passive restraints would, if the public rejected them, cause "disastrous economic consequences for the entire nation." Secretary's Decision, pp. 6, 7, 11.

Secretary Coleman concluded that the "cause of safety would not be served" by mandating airbags or any passive restraints. Secretary's Decision, pp. 27, 30-31, 34,

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[4] The Secretary was particularly concerned about the "feasibility of manufacturing millions" of reliable passive restraints. 41 Fed. Reg at 24072.

36; *see also* 41 Fed. Reg. 24070-71 (1976).[5] The 1976 Blazer at issue in this case was built in August 1976, during the Coleman years.

2. 1977-81: Secretary Adams

Secretary Adams rejected an airbag-only standard again in 1977. He did issue a prospective FMVSS 208 requiring passive restraints to be phased into automobiles beginning in 1981, but was clear that "a lead time of four full years should precede the [phase-in] requirement." 42 Fed. Reg. at 34295. Therefore he determined that passive restraints ought not be mandated, and the option to choose manual belts ought to stay in place, until the phase-in began, for the same reasons Secretary Coleman cited: public acceptance, development of technology, and the need for additional data. 42 Fed. Reg. at 34290-96, 61468; 46 Fed. Reg. at 53420.[6]

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[5] Secretary Coleman planned a demonstration project to help answer the consumer acceptance question. Secretary's Decision, pp. 6-9, 30-33. The program was cancelled by his successor. *See State Farm*, 463 U.S. at 37.

[6] Secretary Adams' prospective mandatory passive restraint regulation was submitted to Congress and not disapproved by it. But Congress provided in the Department of Transportation's annual appropriation legislation for 1979 and 1980 that "[n]one of the funds appropriated under this Act shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system)." 92 Stat. 450 (1978); 93 Stat. 1039 (1979). "Belt System" meant the "active restraint system, which is the lap-shoulder belt system that we have on cars today." 125 Cong. Rec. 36924-25 (1979).

The phase-in did not apply at all to multipurpose passenger vehicles, like the Blazer here; as to them, Secretary Adams' standard continued to grant the manual seat belt option indefinitely. 42 Fed. Reg. 28135-36 (1977).

D. 1981-1989: The Final Decision.

1. 1981: Secretary Lewis.

In 1981, Secretary Lewis delayed Secretary Adams' phase-in, and then rescinded it. He concluded that manufacturers should "continue to have the current option" to provide seat belts, and reaffirmed it. 46 Fed. Reg. 12033-36, 53419 (1981). This Court reviewed that rescission decision and remanded it, holding that Secretary Lewis had not adequately set forth the reasons for it. *State Farm*, above, at 57.

2. 1984: Secretary Dole.

Upon remand, Secretary Dole undertook a comprehensive review of all restraint systems, 49 Fed. Reg. 28962-63, 28991, 28996 (1984), and reached a "final decision" respecting passive restraints. She determined that greater manual seat belt use, not any form of passive restraint, was the "quickest, least expensive way by far to significantly reduce fatalities and injuries." 49 Fed. Reg. at 28997. Therefore, she mandated a phase-in of passive restraints, but provided that the phase-in was not to begin until 1987, and was not to begin at all if states with two-thirds of the population enacted mandatory use laws ("MULs") by then. She further provided that the phase-in

was to cease after it began if sufficient states enacted MULs between 1987 and 1989.

Secretary Dole determined not to mandate airbags or any other particular passive restraint before, during or after the phase-in. She found "a number of reasons" not to require airbags in particular, including these: (1) "An airbag alone is less effective" than three-point seat belts when used, 49 Fed. Reg. at 28986; (2) airbags are costly, and are especially costly to replace, *id.* at 29001; (3) airbags may not protect out-of-place occupants and, in fact, might cause injuries, especially to children, *id.* at 28992, 29001; and (4) the public fears airbags and may not accept them. *Id.* at 29001. The Secretary concluded that no one system should be mandated because "by restricting the manufacturers, the Department runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems." *Id.* at 29001.

Secretary Dole's FMVSS 208 was challenged, the challenge to it was dismissed, *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474 (1986), *cert. denied*, 480 U.S. 951 (1987), and it is the FMVSS 208 in effect today.[7] From 1984-1987, it granted the same option to install manual seat belts that its predecessors did. The passive restraint phase-in it called for began in 1987, because sufficient states had not enacted MULs by then. In the upcoming model year (1990), it will require passive restraints in all passenger cars, but grants the manufacturer the option as to what passive restraint to install.

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[7] With minor modifications.

As to multipurpose passenger vehicles, like the Blazer here, the phase-in did not apply at all, and FMVSS 208 continues to grant the same three options as to them – specifically including manual seat belts – it has granted since before Secretary Coleman's years. 49 C.F.R. § 571.208, S4.2.2.

Summary. FMVSS 208 has never required airbags, and from the beginning up to Secretary Dole's final decision and the phase-in called for by it, the FMVSS 208 in effect in each year has granted manufacturers the option to install manual seat belts in all cars built in that year. As of today, it grants that option in respect to multipurpose passenger vehicles.

REASONS FOR DENYING THE WRIT

I. THE FIRST CIRCUIT'S DECISION FOLLOWS SETTLED LAW.

Petitioner charges that Judge Campbell's opinion for the Court reflects an "unprincipled use of the implied preemption doctrine," and so is an "open invitation to the wholesale displacement of state law by activist federal judges." (Petitioner's Brief ["Pet."], p. 16) Actually, the opinion reflects a careful, scholarly application of settled implied preemption principles, and enjoys the virtually unanimous approval of federal judges across the land. (*See* II, below.)[8]

Thus, the First Circuit began with the undisputed rule that "preemption is a matter of Congressional

[8] It is petitioner who invites "activism." The organization that represents her, Trial Lawyers for Public Justice, was

(Continued on following page)

intent." (Appendix to Petition for Certiorari ["App."], pp. 12a-13a) It found that neither § 1392(d) – which preempts nonidentical state standards – nor § 1397(c) – the so-called savings clause – expressly set forth Congress' intent in respect to the problem before it. (App., pp. 6a-7a, 13a, 24a, 27a) Therefore, it looked to "the goals and policies of the Act," as settled law required it to do. (App., p. 27a (*quoting International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987)) It concluded that Congress "believed that for the federal standards to be effective, they had to be uniform throughout the country," and that "Congress thus intended that all of the FMVSS, including FMVSS 208, be uniform national standards." (App., p. 38a)

FMVSS 208 authorizes vehicles to be equipped with manual seat belts, not passive restraints. (App., pp. 14a, 29a) A state regulation requiring all vehicles to be equipped with passive restraints would, therefore, take away the option FMVSS 208 grants, would not be identical to it, and instead would conflict with it. It would also

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formed to bypass Congress' regulatory plan, and reopen in the courts the mandatory airbag issue the Department resolved. *See, e.g.*, Teret & Downey, *Air Bag Litigation*, 18 Trial, July 1982 at 93. As explained in the article entitled *The Air Bag Goes To Court*, N.Y. Times, Oct. 29, 1984, § D at 1, col. 4:

> [A] small group of trial lawyers from around the nation has quietly developed a new strategy that they hope will move the airbag question out of the regulatory agencies and into the courts. . . . "We are trying to use economic pressure to force them to offer airbags," said Joan Claybrook, . . . one of the leading forces behind the campaign [and a founder of Trial Lawyers for Public Justice].

effect nonuniformity; indeed, it would create a patchwork – even a crazy quilt – of different restraint standards across the country. (pp. 18-19, below). Accordingly, § 1392(d) would expressly preempt it (App., pp. 31a-32a); no one disputes that.

Petitioner's common-law claim, if allowed, would be "tantamount to establishing" such a "conflicting" state regulation (App., pp 14a, 16a), and have essentially the same "effect." (App., pp. 32a-37a) For it "would likewise destroy the national uniformity of the federal standard and exceed the state's authority." (App., p. 38a)[9]

Therefore, the First Circuit reasoned, that state common-law claim, if allowed, would "interfer[e] with the method by which Congress intended to meet" its goal. (App., pp. 28a-29a (*following and quoting Ouellette*, above)) Accordingly, that claim presents an "actual" and "direct conflict" with the Safety Act and "stands as an obstacle to" it. (App., pp. 27a-28a, 38a-39a, 40a-41a (*following and quoting Schneidewind v. ANR Pipeline Co.*, ___ U.S. ___, 108 S. Ct. 1145, 1151 (1988), *in turn quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Consequently, "Congress's purposes . . . plainly imply a preemptive intent"

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[9] State law damage claims plainly have a regulatory effect. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy"); *Ouellette*, 479 U.S. at 498 n.19 (state common-law suit, if allowed, would "compel" water discharger not to do what federal law permits). (App. 32a-33a) Petitioner does not address these authorities, but does agree that common-law damage actions "alter future conduct by the incentives they create." (Pet., p. 17)

as to that claim (App., p. 16a), and so it is, necessarily, "impliedly preempted." (App., pp. 38a-39a)[10]

That unimpeachable analysis is not an "open invitation" to do anything but follow settled law. Nor is it "open" in respect to the Safety Act. Safety Act standards are, in general, performance standards (App., p. 47a; 15 U.S.C. § 1391(2)), and the "usual common law action for design defect" "creates a design standard rather than a performance standard." (App., p. 47a) Therefore, a "direct conflict between a common law design standard and a Safety Act performance standard" is "a rare event indeed." (App., p. 15a n.9) But § 1410b, unique in the Safety Act, speaks to restraint systems – a design.

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[10] Petitioner points to *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1983), but there was no conflict, much less direct, between any applicable federal standard and the state standard there. (*See* App., pp. 34a-37a, 40a-41a) Petitioner also complains that Congress was "well aware" that the FMVSSs "would not provide for victim compensation." (Pet., p. 17) But Congress expressly permitted states to enforce FMVSSs (§ 1392(d)), and no one contends that a state could not provide a tort action for failure to comply with one. Petitioner adds that Congress "traditionally preempts direct regulation and preserves common law claims" (Pet., p. 18) – but not when the common-law claim directly conflicts with a federal law or regulation. *See, e.g., Abilene*, above; *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Ouellette*, above; *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S. Ct. 838 (1989); *Cippolone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987).

Moreover, FMVSS 208,[11] issued under § 1410b, sets forth detailed design requirements with respect to seat belt restraint systems. Accordingly, FMVSS 208 "has elements of a design standard." (App., p. 48a)

FMVSS 208 is unique for that reason (and others, pp. 19-20, below). In part because it is unique, and in part because "airbag suits are of the broadest general applicability – potentially affecting every vehicle on the road," this is the "rare" and "narrow" claim which, if allowed, would both establish "what is in practical effect a new safety standard" and create "a direct conflict" with the federal standard. (App., pp. 15a, 24a, 40a, 50a-51a) That is also why it is plainly preempted.

Petitioner says nothing about any of that.

II. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE HOLDING OF ANY OTHER CIRCUIT OR STATE COURT OF LAST RESORT.

Petitioner claims that the First Circuit's decision "conflicts with the decisions of other circuits and state courts of last resort." (Pet., p. 9) In fact, every appellate court in the country to address the airbag preemption issue agrees with the First Circuit, including the *Wickstrom* court; this Court declined to review *Wickstrom* last year.

As to Petitioner's cases, they do not concern FMVSS 208, or airbags, or federally granted design options that state law would prohibit, or, in most cases, preemption.

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[11] Together with FMVSS 209. 49 C.F.R. § 571.209.

A. The State and Federal Courts Have Unanimously Held Airbag Claims Preempted.

In addition to this case, five appellate courts – two other federal and three state – have addressed the airbag preemption issue. All have held airbag claims preempted. *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989); *Nissan Motor Corp. v. Superior Court*, ___ Cal. App. 3d ___, 1989 Westlaw 88668 (Cal. Ct. App. May 26, 1989); *Gardner v. Honda Motor Co.*, 536 N.Y.S.2d 303 (N.Y. App. Div.), *appeal dismissed*, 543 N.Y.S.2d 401 (1988); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2905 (1988). A host of trial courts across the country agree. *See, e.g., Pokorny v. Ford Motor Co.*, 714 F. Supp. 739 (E.D. Pa. 1989); *Surles v. Ford Motor Co.*, 709 F. Supp. 732 (N.D. Tex. 1988); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. 1988); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270 (N.D. Ga. 1987); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039 (D. Mont. 1987); *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (D.S.D. 1987); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986); *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986); *Heftel v. General Motors Corp.*, 1988 Westlaw 19615 (D.D.C. Feb. 23, 1988); *Hunter v. General Motors Corp.*, Prod. Liab. Rep. (CCH) ¶ 12,039 (D. Conn.

Dec. 27, 1988); *Howard v. American Motors Corp.*, Prod. Liab. Rep. (CCH) ¶ 11,955 (S.D. Tex. July 6, 1988).[12]

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[12] In addition to the published decisions, dozens of unpublished decisions hold airbag claims preempted. *See, e.g., Hunt v. Ford Motor Co., Inc.*, No. 88-AR-1756 (N.D. Ala. March 30, 1989); *Falk v. Chrysler Corp.*, No. R-87-1057 (D.C. Md. Feb. 24, 1989); *Vasquez v. Ford Motor Co.*, No. CIV 86-0657 PHX WPC (D. Ariz. Nov. 4, 1986), *motion for reconsideration denied*, (D. Ariz. Feb. 19, 1987); *Donnelly v. General Motors Corp.*, No. 86-576-JU (D. Or. Aug. 3, 1987); *Kane v. Mitsubishi Motor Sales of America Inc.*, No. 9649/88 (N.Y. Sup. Ct. June 19, 1989); *Nissan Motor Corp. v. Meier*, No. 5040894 (Cal. Ct. App. May 26, 1989); *Gingold v. Audi-NSU-Auto Union AG*, No. 6155 (Pa. Ct. C.P. May 12, 1988); *Groves v. Chrysler*, No. 84-7-302 (Or. Cir. Ct. March 15, 1988); *Little v. Chrysler*, No. 84-11-103 (Or. Cir. Ct. March 15, 1988); *Sutton v. Allenberg*, No. 6551 (Idaho Dist. Ct. Feb. 25, 1988); *Schwartz v. Volvo, North America Corp.*, No. CV86-7701 (Ala. Cir. Ct. Mar. 10, 1988) *aff'd on other grounds*, (Ala. Sup. Ct. July 28, 1989); *Matthews v. Chrysler Motor Corp.*, No. 87-P-675 (Ohio Ct. C.P. Jan. 9, 1989); *Bass v. General Motors Corp.*, No. SA-86-CA-279 (W.D. Tex. Sept. 14, 1987) (adopting and modifying Magistrate's Decision of July 24, 1987); *Rodriguez v. General Motors Corp.*, No. CV88 3361 SVW (GX) (C.D. Cal. Oct. 4, 1988); *Ritt v. General Motors Corp.*, No. 86 C 1737 (N.D. Ill. Jan. 20, 1988); *Distler v. General Motors Corp.*, Civ. No. 4-86-821 (D. Minn. Sept. 8, 1987); *Noone v. General Motors Corp.*, No. 85-68704 (Tex. Dist. Ct. Jan. 24, 1989); *McRoberts v. Ryals*, No. 86-1630-M (Tex. Dist. Ct. Oct. 13, 1988); *Garman v. Mazda Motor Corp.*, No. 85-13839-F (Tex. Dist. Ct. April 6, 1988); *Davis v. Whitworth*, No. 86-125-199 (Tex. Dist. Ct. July 19, 1988); *Perkins v. General Motors Corp.*, No. EAC 57623 (Cal. Super. Ct. Oct. 19, 1988); *Smith v. Towns*, No. 88CV-02-1011 (Ohio Ct. C.P. Oct. 24, 1988); *Hill v. Oakland County Road Comm'n*, No. 88-344327 NP (Mich. Cir. Ct. Nov. 9, 1988); *Seymour v. General Motors Corp.*, C.A. No. 86-2815 (R.I. Super. Ct. Sept. 26, 1988); *Mazey v. General Motors Corp.*, No. A 243811 (Nev. Dist. Ct. Dec. 6, 1988);

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That authority is certainly right. It holds, as, for example, *Wood, Kitts* and *Wickstrom* do, that Congress' purpose to ensure uniform national standards "would be entirely frustrated by permitting individual states to adopt tort rules which would permit liability to be imposed upon manufacturers because of the absence of airbags." *See, e.g., Cox,* above, 646 F. Supp. at 763-64. For if states were free to do that, the upshot would be a patchwork of different restraint standards in different states, and perhaps different standards set by different juries in the same state. The possibilities are kaleidoscopic: four-point belts here, three-point belts there, frontal airbags somewhere else, automatic belts still somewhere else. And so on, as juries saw fit on the basis of whatever was before them from time to time. That "type of ad hoc regulation is exactly what Congress sought to exclude. . . ." *See, e.g., Vanover,* above, 632 F. Supp. at 1096; *Kitts,* 875 F.2d at 789; *Wickstrom,* 416 N.W.2d at 841; *Staggs,* 678 F. Supp. at 272; *Hughes,* 677 F. Supp. at

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Mackey v. American Honda Motor Co., No. 83CV-08-4508 (Ohio Ct. C.P. Dec. 29, 1986); *Parker v. Evans*, No. OCV 36391 (Cal. Super. Ct. June 10, 1988); *McLaughlin v. General Motors Corp.*, No. LK-27-2 (Va. Cir. Ct. May 16, 1988); *Martinez v. Ford Motor Co.*, No. 87-893 CW (Fla. Cir. Ct. Aug. 15, 1988); *Aronowitz v. General Motors Corp.*, Index No. 23118/84 (N.Y. Sup. Ct. Mar. 18, 1988); *Wolfe v. General Motors Corp.*, No. CV8720704 (Ohio Ct. C. P. Mar. 6, 1988); *Pederson v. Ford Motor Co.*, No. 3AN-85-15565 (Alaska Super. Ct. Sept. 24, 1987); *Ross v. Ford Motor Co.*, No. CV119361 (Ohio Ct. C.P. May 5, 1987); *Puzio v. General Motors Corp.*, No. L-07-2325-85 (N.J. Super. Ct. March 27, 1987); *Soboscienski v. Ford Motor Co.*, No. 2NO-85-246 (Alaska Super. Ct. Oct. 28, 1986); *Phillips v. Namie*, No. 85-33951-CA-07 (Fla. Cir. Ct. Sept. 22, 1986).

77-78; Cox, 646 F. Supp. at 763-64; *Howard*, Prod. Liab. Rep. ¶ 11,955, at 34,525.[13]

That authority also holds, as, for example, *Taylor* and *Wickstrom* do, that FMVSS 208 gave manufacturers the option to meet its requirements by choosing any of the three restraint systems sanctioned by it. FMVSS 208 granted that option and the flexibility that goes with it for good and affirmative reasons; that option and its history are unique to FMVSS 208. (pp. 14-15, above) A state rule that in effect required manufacturers to install airbags would take away the manufacturers' option to choose to install manual seat belts, not airbags. Therefore, it would defeat Congress' and the Department's purposes for granting that option. A state rule imposing damages upon a manufacturer for installing seat belts, not airbags, would also punish the manufacturer, after the fact, for doing what federal law authorized it to do.

Therefore, that rule is preempted. For "a state common law rule [like this one] that would, in effect, remove the element of choice authorized in [FMVSS] 208 would frustrate the federal regulatory scheme." *Taylor*, 875 F.2d at 827. Indeed, it is black letter law that a "state common law rule cannot take away the flexibility provided by a federal regulation," "cannot prohibit the exercise of a federally granted option," and cannot impose damages for doing "what a federal act or regulation 'authorized

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[13] Congress was clear that "50 states cannot individually set standards for the automobiles that come into those 50 states from a mass production industry," 112 Cong. Rec. 14232 (1966), for, as the President said, that would be "chaotic." 112 Cong. Rec. 14253.

[one] to do.' " *Id. See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982); *Kalo Brick*, 450 U.S. at 318; *Wickstrom*, above, 416 N.W.2d at 841; *Baird*, 654 F. Supp. at 33; *Cox*, 646 F. Supp. at 763-64; *Heftel*, 1988 Westlaw 19615, at 3.

Petitioner ignores that wealth of authority and the reasons for it, and indeed does not cite a single contrary airbag decision.[14] There is virtual uniformity – perhaps unprecedented uniformity – not conflict, here.

B. Petitioner's Cases Are Not On Point, Much Less Contrary.

Petitioner cites thirteen cases that, she says, conflict with this unanimous authority. But they do not. None concerns airbags; or FMVSS 208; or 15 U.S.C. § 1410b; or an equipment requirement advanced by plaintiff that NHTSA specifically rejected; or the imposition of liability for exercising an option NHTSA specifically granted; or,

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[14] *Murphy v. Nissan Corp.*, 650 F. Supp. 922 (E.D.N.Y. 1987) (not cited by petitioner), is on analysis a reclining seat, not passive restraint, case. *Garrett v. Ford Motor Co.*, 684 F. Supp. 407 (D. Md. 1987) (also not cited by petitioner), is a rear seat belt, not passive restraint, case. Petitioner quarrels that *Taylor* rejects *Wood* (Pet., p. 12), but that is false. *Taylor* agrees with *Wood's* conclusion that the Safety Act neither expressly pre-empts nor saves petitioner's claim, and follows *Wood's* holding with respect to the savings clause. 875 F.2d at 825 n.18, 827-28 n.20. Petitioner also notes that General Motors settled *Ritt v. General Motors* (Pet., pp. 12-13); true – the parties were able to settle *Ritt* after three Circuits had ruled in favor of General Motors.

as the First Circuit put it, "implied preemption of a state law cause of action that would effectively create a state standard" that directly conflicts with a federal standard. (App., p. 49a)

Indeed, eight do not concern preemption at all, and do not mention it. As the First Circuit explains and petitioner concedes, they merely hold that compliance with federal safety standards is relevant (not conclusive) to show that an automobile is not defective as a matter of state law. We agree. But that has to do with the merits of the state law cause of action, and is "entirely different" from preemption and the issue at hand; the First Circuit expressly had "no quarrel with [its] sister circuits' holdings that compliance with a FMVSS is not a defense on the merits to a claim of design defect." (App., pp. 49a-50a) *See Knippen v. Ford Motor Co.*, 546 F.2d 993, 1000 (D.C. Cir. 1976); *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983); *General Motors Corp. v. Edwards*, 482 So.2d 1176, 1188 (Ala. 1985); *Fox v. Ford Motor Co.*, 575 F.2d 774, 785 (10th Cir. 1978)[15]; *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737, 746 (1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 370 Mass. 69, 345 N.E.2d 683, 688 (1976).

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[15] The Tenth Circuit plainly saw no inconsistency between *Fox's* holding on compliance as a defense on the merits, and its holding in *Kitts* that airbag claims are preempted. Moreover, in *Fox* the "main thrust" was that the rear seat belts were at the wrong angle under the applicable federal standard. 575 F.2d at 778.

As to the remaining five, none involves claims based on standards inconsistent with an FMVSS, much less standards that "directly conflict" with the applicable FMVSS. They merely hold, at most, that the Safety Act does not occupy the field, and so permits claims based on common-law standards that do not conflict with an FMVSS.[16] *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (no federal standard governed challenged steering system design); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-58 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (no federal standard governed frame strength and rigidity); *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 654, 656 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982) (vehicle met "certain federal" standards, but the standards were "unrelated to several of the design deficiencies" challenged); *Sours v. General Motors Corp.*, 717 F.2d 1511 (6th Cir. 1983) (no federal roof standard established at time car was designed); *Arbet v. Gussarson*, 66 Wis.2d 551, 225 N.W.2d 431, 438 (1975) (no federal standard governed gas tank design). That is plainly true, but not the issue here.

This case involves a purported common-law standard that "directly conflicts" with the applicable federal standard, and would have "the broadest general applicability – potentially affecting every vehicle on the road." (App., pp. 50a-51a) Therefore, if allowed, it would "destroy the

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[16] Of course, claims that do not directly conflict are not affected by the First Circuit's ruling and only the "rare" claim will conflict. Thus, design claims ordinarily will not conflict with any FMVSS, since, among other things, FMVSSs are performance standards. (pp. 14-15, below) Manufacturing defects claims will never conflict, so all such claims – including claims in respect to alleged defects in the passenger restraint system itself – survive.

national uniformity" Congress intended, and frustrate the statutory scheme. (App., p. 38a) Accordingly, it "stands as an obstacle" to that scheme, and is impliedly preempted under settled preemption law. (App., pp. 29a, 38a-39a) Petitioner's cases have nothing to do with a problem like that. Indeed, as *Wood* observed, "the issue of implied preemption was never argued or addressed" in any of them. (App., p. 51a)

There is no conflict to resolve. *Accord Taylor*, 875 F.2d at 827-28; *Kitts*, 875 F.2d at 789; *Wickstrom*, 416 N.W.2d at 841; *Gardner*, 536 N.Y.S.2d at 306-07; *Staggs*, 678 F. Supp. at 272-73; *Hughes*, 677 F. Supp. at 77-78; *Wattelet*, 676 F. Supp. at 1041; *Schick*, 675 F. Supp. at 1186; *Baird*, 654 F. Supp. at 33; *Cox*, 646 F. Supp. at 763-64; *Heftel*, 1988 Westlaw 19615, at 3; *Howard*, Prod. Liab. Rep. ¶ 11,955, at 34,525.

III. THE FIRST CIRCUIT'S IMPLIED PREEMPTION DECISION DID NOT TURN ON THE ISSUE THAT PETITIONER COMPLAINS ABOUT.

Petitioner complains that the First Circuit was wrong in finding that defective design actions were "an unpromising and, for that reason, virtually nonexistent breed in 1966," so that the 1966 Congress did not "contemplate the likelihood that there would be a state tort action that would effectively create a state design standard conflicting with a federal safety standard." (App., pp. 19a, 21a; Pet., pp. 5-7, 13-17) The First Circuit had good reason to so find. Indeed, Ralph Nader, whose testimony petitioner says alerted Congress to the

existence of design defect litigation,[17] complained in 1967 that "[w]hile a number of suits involving unsafe design have been settled, plaintiffs have had little luck on the trial court level. On appeals, plaintiffs are batting zero." Nader & Page, *Automobile Design and the Judicial Process*, 55 Calif. L. Rev. 645, 645-46 (1967).

But, whether right or wrong, the First Circuit's view of the state of design-defect litigation in 1966 was not the basis for its resolution of the preemption issue.[18] First, the Court was clear that whether or not "Congress foresaw defective design lawsuits," Congress "would not have anticipated the current preemption problem," because "even among the body of lawsuits claiming defective design, only a few would be likely, as here, to establish what is in practical effect a new safety standard. (App., p. 24a) This is so because the Safety Act authorizes promulgation of 'performance' rather than design standards as such." (App., p. 24a) That is certainly true. (pp. 14-15, above)

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[17] The use of this testimony is misleading in any event. The testimony was not before the whole Congress, or even the subcommittee concerned with the Safety Act. In fact, it does not concern the Safety Act at all, much less § 1397(c). The hearings related to General Motors' private investigation into the expert qualifications of Ralph Nader, then young and unknown.

[18] The First Circuit reviewed the state of design defect litigation in 1966 to explain the ambiguity which § 1392(d) and § 1397(c), read together, create. The Eleventh Circuit found those sections ambiguous, and that implied preemption analyses was therefore applicable, without regard to the First Circuit's view of the state of design defect litigation. *Taylor*, 875 F.2d at 824-27.

Second, the Court found that petitioner's claim, if allowed, would stand as an obstacle to – would "frustrate" – the Safety Act and FMVSS 208, and it certainly would. (pp. 18-20, above) That was the basis for the Court's determination that petitioner's claim was impliedly preempted. Petitioner's claim would stand as that obstacle and frustrate the Act and FMVSS 208, whatever the state of design defect litigation in 1966. Accordingly, the conclusion that petitioner's claim is impliedly preempted inevitably follows, regardless of the state of that litigation in 1966. *See, e.g., Taylor,* above.

But, petitioner protests, "given" the savings clause, "once the court below held that there was no express preemption, that should have been the end of the inquiry."[19] (Pet., pp. 16-17) Petitioner overlooks settled law. As the Court of Appeals explained, "*Abilene [Texas & Pac. Ry. v. Abilene Cotton Oil Co.,* 204 U.S. 426 (1907)] and *Ouellette* [above] belie the supposed principle that a general savings clause precludes a court from looking into

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[19] Petitioner also advises that there is a presumption against preemption. But "state law which interferes with the exercise of . . . federally protected rights creates an actual conflict and *is preempted by direct operation of the Supremacy Clause.*" *Brown v. Hotel & Restaurant Employees,* 468 U.S. 491, 505 (1984) (emphasis added). *See Taylor,* above, 875 F.2d at 826, quoting *Felder v. Casey,* ___ U.S. ___, 108 S. Ct. 2302, 2306 (1988), in turn quoting *Free v. Bland,* 369 U.S. 663, 669 (1962):

> The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.

implied preemption." (App., p. 46a) Moreover, a general savings clause ought not be construed "to permit common-law actions that contradict and subvert a statutory scheme." (App., p. 44a)

That is also settled law. *Abilene*, above, 204 U.S. at 429-30, 446 (clause provided "nothing in this act shall in any way abridge or alter the remedies now existing at common law . . . "; existing but conflicting common law remedy held preempted; general savings clause "cannot in reason be construed" in a way "inconsistent with the provisions of the act. . . . [An] act cannot be held to destroy itself"); *Ouellette*, above, 479 U.S. at 494 (clause provided "nothing in this section shall restrict any right which any person . . . may have under . . . common law"; Senate Report stated "compliance with . . . Act . . . would not be a defense to a common law action for- . . . damages"; common law claims subjecting water discharger to "a variety of common law rules" along waterways would undermine Congress' purpose to achieve "clear and identifiable" discharge standards; Congress could not have "intended to undermine . . . [the Act] through a general savings clause"); *Kalo Brick & Tile Co.*, above, 450 U.S. at 328-31. *See also Taylor*, 875 F.2d at 827-28 n.20 (" 'general' savings clause, such as that contained in the Safety Act, does not preclude a finding of implied preemption"); *Wickstrom*, 416 N.W.2d at 840 ("General savings clauses will not preserve common-law claims which interfere with or frustrate the purposes of the act. . . .The purpose of such savings clauses is 'not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those

created by the statute' ") (*quoting Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915)).[20]

The First Circuit's decision, and the wealth of authority in accord with it, are in the mainstream of settled implied preemption law.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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August 25, 1989

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[20] *Also in accord, Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 671 n.22 (1963); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania v. Nelson*, 350 U.S. 497, 501 n.10 (1956); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 210-11 (1986).

RULE 28.1 LIST OF PARTIES

APPENDIX A

General Motors Corporation is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly owned except the following:

Aero Vironment Inc. (USA)

Alambrados Automotrices, S.A. de C.V. (Mexico)

Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)

AMBRAKE Corporation (USA)

Applied Intelligence Systems, Inc. (USA)

Aralmex, S.A. de C.V. (Mexico)

Automotive Polymer Based Composites Joint Venture and Development Partnership (Co-Partnership among GM, Ford and Chrysler to coordinate basic research on plastic component materials)

Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)

Avis, Inc. (U.S.A.)

Bujias Mexicanas, S.A. de C.V. (Mexico)

Cableados de Juarez, S.A. de C.V. (Mexico)

CABLESA-Industria de Componentes Electricos Limitads (Portugal)

Calsonic Harrison Co., Ltd. (Japan)

Comau Productivity Systems, Inc. (USA)

Compagnie de Faisceaux Tunisian International S.A. (Tunisia)

Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)

Componentes Delfa, C.A. (Venezuela)

Componentes Mecanicos de Matamoros, S.A. de C.V. (Mexico)

Conductores y Componentes Electricos, de Juarez, S.A. de C.V. (Mexico)

Convesco Vehicles Sales GmbH (West Germany)

Daewoo Automotive Components, Ltd. (Korea)

Delco Electronics Corporation (USA)

Delkor Battery Company, Ltd. (Korea)

Delmex de Juarez, S.A. de C.V. (Mexico)

Delredo, S.A. de C.V. (Mexico)

Detroit Deere Corporation (USA)

Detroit Diesel Corporation (USA)

DHB – Componentes Automotivos S.A. (Brazil)

DHMS Industries, Ltd. (Korea)

Diffracto Limited (Canada)

DR DE CHIHUAHUA, S.A. de C.V. (Mexico)

Ensamble de Cables Y Componentes, S.A. de C.V. (Mexico)

Fabrica Colombiana de Automotores S.A. ("Colomotores") (Colombia)

General Motors do Brasil, Ltda. (Brazil)

General Motors de Colombia S.A. (Colombia)

General Motors del Ecuador S.A. (Ecuador)

General Motors de Mexico, S.A. de C.V. (Mexico)

General Motors Egypt, S.A.E. (Egypt)

General Motors Espana, S.A. (Spain)

General Motors (Europe) AG (Switzerland)

General Motors France (France)

General Motors Hellas, A.B.E.E. (Greece)

General Motors Iran Limited (Iran)

General Motors Kenya Limited (Kenya)

General Motors del Peru S.A. (Peru)

General Motors de Portugal, Limitada (Portugal)

Genie Mecanique Zairose, S.A.R.L. (Zaire)

GM Allison Japan Limited (Japan)

GMFanuc Robotics Corporation (USA)

Hua Tung Automotive Corporation (Rep. of China)

IBC Vehicles Limited (England)

Ilmor Engineering, Ltd. (England)

Industries Mecaniques Maghrebines, S.A. (Tunisia)

Industrija Delova Automobila, Kikinda (Yugoslavia)

INLAN-Industria de Componentes Mecanicos, Lda. (Portugal)

Isuzu Motors Limited (Japan)

Isuzu Motors Overseas Distribution Corp. (Japan)

Kabelwerke Reinshagen GmbH (West Germany)

Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)

Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)

Koram Plastics Company, Ltd. (Korea)

Metal Casting Technology, Inc. (USA)

Motor Enterprises, Inc. (USA)

New United Motor Manufacturing, Inc. (USA)

NHK Inland Corporation (Japan)

Omnibus BB Transportes, S.A. (Ecuador)

Packard Electric Ireland Limited (Ireland)

Promotora de Partes Electronics Automotrices (Mexico)

P.T. Mesin Isuzu Indonesia (Indonesia)

Rimir, S.A. de C.V. (Mexico)

Rio Bravo Electricos, S.A. de C.V. (Mexico)

Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)

Shinsung Packard Company, Ltd. (Korea)

Sistemas Electricos y Commutadores, S.A. de C.V. (Mexico)

Sung San Company, Ltd. (Korea)

Suzuki Motor Co., Ltd. (Japan)

Tactical Truck Corporation (USA)

Teknowledge, Inc. (USA)

TEREX Equipment Limited (Scotland)

Vauxhall Motors Limited (England)

Vestiduras Fronterizas, S.A. de C.V. (Mexico)

View Engineering (USA)

Volvo GM Heavy Truck Corporation (USA)